Supreme Court, U.S.
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No. 93-1389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

REFCO, INC.,

Petitioner,

– against –

THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI, and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner Refco, Inc. ("Refco") respectfully submits this brief in reply to the opposition briefs submitted by Respondents the Emirate of Dubai (the "Emirate") and the Committee of Receivers (the "Committee").

Refco's petition demonstrates that this Court should grant certiorari to review the Second Circuit's interpretations of the commercial activity and waiver exceptions under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et. seq.* ("FSIA"), because the circuit court's interpretations are contrary to the plain language of §§ 1605(a)(1) and (a)(2). Refco respectfully refers the Court to the reply brief submitted by Petitioner The Drexel Burnham Lambert Group Inc. ("Drexel") (No. 93-1361). That brief fully addresses respondents' assertions with respect to the commercial activity and waiver exceptions to foreign sovereign immunity.

RESPONDENTS' "ALTERNATIVE GROUNDS" TO SUSTAIN THE SECOND CIRCUIT'S DECISION ARE WITHOUT MERIT

The Emirate raises a number of additional defenses to Refco's and Drexel's amended and supplemental complaints (Em. Br. at 20-26), none of which were addressed by the Second Circuit. PA 27a. None of these other defenses has any bearing on the reasons why this Court should review the Second Circuit's decision under the commercial activity and waiver exceptions under the FSIA. Moreover, each of the additional defenses are without merit.

A. The District Court Properly Rejected Respondents' Proffered Defense Under The Act Of State Doctrine.

The district court correctly found that the act of state doctrine is inapplicable here because the challenged acts were commercial in nature -- the repudiation of commercial debts -- rather than public in nature. PA 65a-68a, *citing Alfred Duhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976).

The district court found the act of state doctrine to be inapplicable for the further reason that the challenged acts of respondents were not accomplished wholly within Dubai. The doctrine does not bar inquiry into the validity of a foreign

state's extraterritorial taking. *See, e.g., Banco Nacional de Cuba v. Chem. Bank N.Y. Trust*, 658 F.2d 903, 908 (2d Cir. 1981). The district court reasoned that because the situs of the debts is in the U.S., respondents' refusal to pay those debts did not occur within the borders of Dubai. PA 67a-68a. Refco's breach of contract and taking claims are not barred by the act of state doctrine for the further reason that these claims are based on significant conduct in the U.S., including promises in the U.S. with respect to the adjudication and payment of Refco's claims. Thus, an adjudication of Refco's (and Drexel's) claims would involve an examination of the Committee's U.S. acts, and not acts accomplished wholly within Dubai.

The Emirate misses the point in arguing that the act of state doctrine is applicable because petitioners' claims are based on acts which "*came to fruition*" in Dubai. Em. Br. at 21-22 (emphasis in original). Significant wrongful conduct on the part of respondents, including the Committee's promises to pay, occurred in New York. The Emirate also misplaces reliance on *Asociacion de Reclamantes v. United Mexican States*, 561 F. Supp. 1190, *aff'd*, 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985). Em. Br. at 22. In that case, Mexico assumed responsibility for payment of plaintiffs' land grant claims. The only activity, or lack thereof, leading to plaintiffs' taking claims occurred wholly within the borders of Mexico. Unlike the instant case, plaintiffs in *Asociacion de Reclamantes* did not allege that the Mexican government engaged in any wrongful conduct in the U.S.

B. The District Court Properly Determined That The Committee Is Not Entitled to Quasi-Judicial Immunity.

The district court correctly determined that the Committee's claim of judicial immunity is unsupportable because it is the Committee's commercial activities, not purported quasi-judicial activities, which subject it to jurisdiction under the FSIA. PA 69a. In addition, the Emirate mischaracterizes Refco's claims in an effort to support its assertion that the "gravamen" of each claim is the Committee's improper "judicial" activities. Em. Br. at 22. To the contrary, respondents' liability does not arise from any purported quasi-judicial status of the Committee, but

rather from their status as successors to Galadari's debts and from the Committee's promises to Refco. Finally, respondents cannot assert judicial immunity from Refco's taking claim, which is based on adversarial, not "judicial," conduct by the Committee and the Emirate.

C. The District Court Properly Found That The Committee Is The Agent of The Emirate.

The district court correctly found that the Committee was created, and has at all times acted, as the Emirate's agent and, therefore, the jurisdictional contacts of the Committee may be attributed to the Emirate. PA 53a. The facts of the record amply support the district court's finding of a principal-agent relationship between the Emirate and the Committee. The Emirate seized Galadari's assets and took over the ownership of the Union Bank, thereby succeeding to all of Galadari's business interests. The Emirate vested the Committee with power to operate and dispose of the Galadari non-banking assets and to bring or defend legal proceedings. The record shows also that the Emirate agreed to approve any sale or other disposition of Galadari assets by the Committee; the Committee has no separate corporate or juridical existence and has been immunized by the Emirate for its conduct; the Committee has acknowledged that the Emirate has a "very substantial and direct interest in the conduct" of the Committee's proceedings; and the Committee has held itself out as acting on behalf of the Emirate since the inception of these actions. *See Banco Nacionale de Cuba*, 658 F.2d at 910-11. As the Emirate's agent, the Committee's voluntary appearance and waiver of immunity properly was attributed to the Emirate. PA 53a.

The Emirate contends that the district court erred because it did not make "factual findings" or discuss the principles of agency upon which the finding relied, whereas the Emirate showed that it "did not direct or control the Committee." Em. Br. 23. However, such direction or control to support a finding of an alter ego relationship is not relevant to the finding here of a principal-agent relationship. *See Lowendahl v. Baltimore & O.R. Co.*, 287 N.Y.S. 62, 74-75 (1st Dep't), *aff'd*, 272 N.Y. 360 (1936).

Even if an alter ego finding were necessary to establish that the jurisdictional contacts of the Committee are attributable of the Emirate, petitioners' amended pleadings and submissions to the district court set forth sufficient facts to support such a finding. In *First Nat'l City Bank v. Banco Para El Comercio*, 462 U.S. 611, 628-29 (1983) ("*Bancec*"), this Court held that an alter ego relationship can be found where the foreign state controls the instrumentality, the foreign state and its instrumentality are therefore "one and the same" and are treated as one juridical person. *See also American Int'l Group v. Islamic Republic of Iran*, 493 F. Supp. 522, 526 (D.D.C. 1980). Here, petitioners' complaints allege that the Emirate has retained control and authority over the Committee with respect to the assets and business affairs of Galadari. Under *Bancec*, an alter ego relationship may be found also where it would be inequitable not to do so. 462 U.S. at 630-34. Here, it would be inequitable to distinguish between the Emirate and the Committee. The Emirate appointed the Committee and sent it to defend the actions commenced by Refco and Drexel. The Committee's conduct resulted in a prejudicial delay of those actions and petitioners' non-payment. The principal beneficiary of the Committee's conduct is the Emirate. Allowing the Emirate to avoid jurisdiction under these facts, and where it could not have done so had it appeared on its own, would be inequitable.[1]

D. Refco's Claims are Not Barred Under § 1605(a)(5).

1. Refco's claims are commercial in nature and, therefore, are not encompassed by § 1605(a)(5). Section 1605(a)(5) applies only to "any case ... not otherwise encompassed in [§ 1605(a)(2)]." Therefore, under the plain language of the statute, where a claim falls within the commercial

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[1] It should be noted that, in both courts below, petitioners requested that, in the event the courts were to determine that the pleadings and the pre-discovery record were insufficient to support a finding that the Emirate is responsible for the Committee's acts, petitioners should be permitted to conduct discovery and submit further factual findings.

activity exception, subject matter jurisdiction exists and § 1605(a)(5) does not apply to bar a claim. *See, e.g., Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1875, 1889 (5th Cir. 1992). Refco's and Drexel's contract claims under § 1605(a)(2) and taking claims under § 1605(a)(3) thus are not barred as non-commercial torts under § 1605(a)(5).[2]

2. **Refco's claims are for breach of contract and taking, not, as the Emirate asserts, for the torts of misrepresentation, abuse of process or interference with contractual rights within the meaning of § 1605(a)(5)(B).** Em. Br. at 24. Refco's pleading sets forth elements for breach of contract: a promise upon which Refco relied to its detriment resulting in damage. Similarly, Refco alleges facts evidencing that its right to payment of a valid contractual debt was taken in violation of international law. That elements of a tort claim also may be present in a pleading does not preclude the plaintiff from bringing an otherwise valid contractual or taking claim. *Cf. Gregory Lumber Co. v. U.S.*, 9 Cl. Ct. 503, 525, *aff'd*, 831 F.2d 305 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988) (addressing the Tucker Act, which contemplates jurisdiction over the U.S. arising out of a contract where the case "is not one solely sounding in tort," holding that "where an enforceable contract is alleged, an action for breach [is] not [a case solely sounding in tort] simply because elements of tort [are] present in the claim") (citation omitted); *accord Edwards v. U.S.*, 19 Cl. Ct. 663, 669 (U.S. Cl. Ct. 1990) (addressing the Federal Tort Claims Act (which parallels § 1605(a)(5)) and holding that "where privity of contract exists between the parties, there is a contract aspect to a claim for misrepresentation ... and subject matter jurisdiction exists") (citation omitted).

3. **Nor are Refco's contract and taking claims barred by the discretionary function exception under**

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[2] The Emirate also misplaces reliance on decisions under § 1605(a)(5) which address only non-commercial activity. *See, e.g., Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989). Em. Br. at 24.

§ 1605(a)(5)(A). The Emirate fails to cite any authority which holds that claims properly pleaded pursuant to §§ 1605(a)(2) and (a)(3) may be barred under § 1605(a)(5)(A). Em. Br. at 24-25.

In any event, petitioners' claims are *not* premised upon an immune exercise of governmental discretion. The record demonstrates that the Committee exercised no discretion in adjudicating Refco's and Drexel's claims. The Committee merely executed the Emirate's determination to refuse payment for gambling debts. *See* PA 28a. In addition, § 1605(a)(5)(A) does not protect *all* acts of discretion. In *United States v. Gaubert*, 111 S. Ct. 1267, 1275 (1991), this Court recently analyzed the discretionary function exemption of the Federal Torts Claims Act and declared that the exemption does not protect all governmental actions, but only "decisions based on considerations of public policy." *See also Andrulonis v. U.S.*, 952 F.2d 652, 655 (2d Cir. 1991), *cert. denied*, 111 S. Ct. 2992 (1992) (citing *Gaubert*, the court held that one must focus on the "nature of the conduct" at issue in determining whether the conduct furthers the general policy behind the regulation).

In the court below, the Emirate asserted that the Committee's refusal to pay Refco and Drexel was grounded in the Emirate's policy to "create[] an orderly insolvency procedure ... in order to forestall financial catastrophe in Dubai and the surrounding region...." However, the "nature of the conduct" at issue is not based on the purposes the regulatory scheme seeks to accomplish. *See Andrulonis*, 952 F.2d at 655. The Committee, at the direction of the Emirate, engaged in conduct designed solely to frustrate Refco's valid right to payment. Such egregious conduct cannot be said to be grounded in the policy of the Emirate to create an orderly insolvency procedure.

E. Respondents Are Not Immune From Refco's Claims For Taking Refco's Property Rights In Violation Of International Law.

The Emirate argues that petitioners' taking claims do not meet the taking exception under § 1605(a)(3). The Emirate is wrong. In any event, even if the taking claims were found not to meet § 1605(a)(3), respondents still would subject to

jurisdiction under the commercial activity and waiver exceptions under the FSIA.

Refco's taking claim alleges that respondents wrongfully deprived Refco of its right to payment of a valid contractual debt. The appropriation was accomplished through the seizure of Galadari's assets and a campaign by the Emirate's representative, the Committee, to fabricate issues and manufacture evidence adverse to Refco so that Refco would not receive payment. The Emirate, as successor to the Union Bank, is the direct beneficiary of this campaign of appropriation. Refco thus states a claim against respondents for a taking in violation of international law. *See Banco Nacional de Cuba v. Chem. Bank N.Y. Trust Co.*, 822 F.2d 230, 237 (2d Cir. 1987); *West v. Multibanco Comerex, S.A.*, 807 F.2d 820, 825-26 (9th Cir.), *cert. denied*, 482 U.S. 906 (1987); *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 616 F. Supp. 660, 663 (W.D. Mich. 1985).

The Emirate's assertion that respondents' conduct constituted mere "adjudication" of Refco's and Drexel's claims for payment, and not a "taking" of those claims (Em. Br. at 25) is belied by the facts. The record confirms that the denial of payment to Refco and Drexel was arbitrarily dictated by the Emirate. In 1991, the district court found that the record presented "no credible alternative" to the Committee but to pay Refco and Drexel from Holdings' funds. *Drexel v. Galadari*, 127 B.R. 87, 98 (S.D.N.Y. 1991). In addition, while the Emirate asserts that the denial of payment was not discriminatory, it is undisputed that the Emirate represents 90% of the monetary claims in the Galadari liquidation, and Refco's and Drexel's claims represent 97% of the admitted debt of Commodities.

Refco's taking claim also meets the nexus requirement of § 1605(a)(3). The property taken from Refco is controlled and operated by the Committee, which has engaged in commercial activity in the U.S. The debt is owed by Holdings and is within the Committee's custody and control, which has controlled and operated Holdings. The Committee repeatedly has stated that it has the funds to pay the contractual obligation,

and has continued the commercial activity of, *inter alia*, Holdings.[3]

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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[3] The Emirate concedes that Refco's taking claim is timely to the extent that it is premised on the Committee's 1991 actions. Em. Br. at 23 n.20. The Emirate argues, however, that Refco's claim is based, in part, on the issuance of Emiri decrees in 1983 and 1984 and, therefore, untimely. *Id.* This argument properly was rejected by the district court. PA 70a. Refco could not have maintained its taking claim until there was a wrongful taking without compensation in violation of international law, which did not occur until 1991. Refco's claims were asserted timely in February 1992. Moreover, the district court properly held that even if Refco's claim accrued in 1984, under the circumstances, respondents' conduct estops them to assert a statute of limitations defense. PA 69a-70a. *See, e.g.*, *Robinson v. Pan American World Airways, Inc.*, 650 F. Supp. 125, 127 (S.D.N.Y. 1986).